TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL., PETITIONERS,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 19, 1947.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 3243

PAUL AHRENS, MAX ARMBRUSTER, WILLI BACKOFEN, PAUL BANTZ, Maria Bertelmann, Else Brink, Walter Brink, Karl J. Boehm Max Blank, Otto Braunger, Albert Brueckner, Alrich Cappelmann, Ernst E. Christoph, Hans Diebel, Hans Doelle, Johann R. Enders, Walter Engelbert, Wilhelm Engelbert, Anna Faller, Xaver Faller, Richard Felis, Walter Feltz, John C. Fitting, Kurt Fries, Luise Fritsch, Anna Fuhr, Eberhard Fuhr, Karl Fuhr, Rudolf Funk, Paul Geis, Adolpf Goelzer, Otto Grimm, Georg Grytzyk, Rudolf Gudert, Wilhelm Hack, Helene Hackenberg, Rudolf Hackenberg, Robert Hartmann, Albert Haug, Erna Haupt, Heinz Heinzen, Werner Hofling, Hedwig Hohmann, Martin Hohmann, Paul Hohmann, Hermann Hoehn, Kurt Holz, Andreas Heinrich Jans, Hans Juhl, Johannes L. Jung, Wolfgang T. Jung, Konrad Jungklaus, Wilhelm Kaecher, Joseph Kaiser, Marie Kerling, Julius Kessler, Hans Kippenberg, August Klapproth, Josef Klein, George B. Knaepper, Paul Knauer, Wilhelm Knaup, Fritz Koehler, Hermann [fol. 2] Koetter, Maria Th. Kohler, Mathias Kohler, Hans L. Kohpeiss, Albert Kolb, Bruno Koop, Jr., Bruno Koop, Sr., Alfred Krakau, Heinz Krebs, Arthur Kuehn, Joseph Kuehn, Wilhelm Lachnicht, Ernst Lack, Hans Laudage, Alois Lieb, Gotthilf Ludwig, Wilhelm Mank, Elisabeth Meuser, Waldemar Meuser, Gertrud Neubacher, Otto Neubacher, Georg Neuper, Karl Nuernberger, John Oldin, Willie Orths, Martin Ortner, Adolf Pasquay, Hans Poehner, Max Rapp, Rosine Rapp, Erich Raubenheimer, Hartwig Reese, Henry Reese, Kasper Rehle, Maximilian Reichel, Werner Reimann, Ludwig Resch, Georg Riemenschneider, Hermann Roehm, Theodore Kurt Roehner, Anna Rubischon, Edwin Rubischon, Anton Rueble, Gerhard Schacht, Peter Schau, Wilhelm Schaumann, Karl Schelkshorn, Martin Schluckwerder, Hans J. Schmidt, Kurt Schmidt, Bernhard Schmolke, Hans Schnoor, Franz Schrader, Albert Schroeder, Siegfried Schulte, Karl Schweitzer, Kurt Schweitzer, Ernst Schwenk, Hermann

Schwinn, Herbert C. Seyfferth, Gerhard Sprenger, Agnes Stephan, Meta Stoehr, Johann Stoll, Walter Sykora, Karl [fol. 3] Ueberscheer, Antonie Uhlig, Hugo Unrecht, Gregor Volkheimer, Otto Wagner, Hans E. Weik, Hans Wichers, Johann Wichers, Selma Wichers, Maria Willumeit, Paul Zitzmann, Petitioners,

(Of Ellis Island, New York Harbor)

vs.

Tom C. Clark, Attorney General of the United States Department of Justice, Washington, D. C., Respondent

Petition for Writ of Habeas Corpus—Fied July 17, 1947

The petitioners referred to above are now confined at Ellis Island, New York Harbor, and are subject to deportation to Germany. Due to the fact that they are held to be persons who adhered to the Nazi form of government during the war, petitioners say unto the Court that at no time have they committed any crimes nor can it be shown that they were guilty of anything tending to interfere with the war effort or to undermine the morale of the armed forces. Petitioners say unto the Court that they are in imminent danger of removal and are subject to the custody and control of Tom C. Clark, Attorney General of the United States.

Petitioners say that while they were accorded a perfunctory hearing, it did not conform to due process of law in that the Board appointed was not fair and impartial but had already prejudged the merits of the case. Petitioners say that they were not given the right to offer testimony in their own behalf, nor were they offered the opportunity to confront the accusers appearing against them, nor were they permitted to cross-examine the witnesses, or given the right of assistance of counsel. Petitioners say that this is a [fol. 4] fundamental right and inasmuch as their freedom is at stake the constitutional question involved in this case is serious and important.

Petitioners say further that there is no legal basis upon which the Attorney General can now remove these persons to Germany inasmuch as the war is practically at an end and the President of the United States has virtually surrendered all of his war powers and without the full exercise of the war powers permitted during the existence of an

emergency, these petitioners could not be removed unless they were removed under the ordinary immigration and deportation laws.

Petitioners say further that if they are sent to Germany they will be sent to the Russian zone of occupation, which will result in servitude and perhaps death.

Petitioners say further that there is no valid government of Germany to receive these persons in accordance with ordinary law and usage inasmuch as the control of Germany is in the hands of three powers and would have the force and effect of turning these persons over to the Communistic rule of Rusia. Petitioners say unto the Court that they have consistently and at all times opposed the doctrine of Communism and have fought it constantly.

It has been understood and agreed that unless the petitioners were definitely shown to have been active members of the Nazi party or actively adhering to the Nazi form of government they would not be removed from our shores, and petitioners say unto the Court that they can show satisfactorily that they have not been active members of the Nazi party or adhered to the Nazi form of government.

Wherefore, the premises considered, petitioners pray:

1. That writ of habeas corpus issue from this Court directed to the respondent, Tom C. Clark, Attorney General of the United States, requiring him to show cause why the [fol. 5] petitioners should not be released from custody.

2. And for such other and further relief as the circumstances of the case may require and to this Court may seem just and proper.

James J. Laughlin, Attorney for Petitioners.

Subscribed and sworn to before me this 17th day of July, 1947. Flora Hock, Notary Public, D. C.

James J. Laughlin, National Press Building, Counsel for Petitioners.

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS—Filed July 23, 1947

Now come the petitioners and amend their petition to state the following:

A considerable number of the petitioners herein are not in fact alien enemies, as defined in the Act of July 6, 1798, Title 50, Section 21, United States Code, in that their citizenship was taken from them without due process of law and as a result of war hysteria. Petitioners ask the Court for an opportunity to present evidence on this aspect of the case.

When the orders of removal were issued there was no longer a war and the petitioners were no longer alien enemies, as defined in the Act of July 6, 1798. A study of the Congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words "declared war" and "hostile nation or government", the legislators had in mind "war in fact" or "actual hostilities" and not a technical "state of war".

When this Act was written in the spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to spread [fol. 7] across the Atlantic and engulf the United States (see *Bas* vs. *Tingy*, 1800, 4 Dallas 37, at 40). The other, was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

> "* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons (aliens) as any of the States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808."

In view of the proclamation issued to the people of Germany and in view of the official declaration of the Department of State declaring the complete demise of the German government, the cessation of actual hostilities and the assumption of supreme authority by the Allied Powers as to

every function of the former German government, it is respectfully submitted that not later than October 29, 1945, the political branch of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

When the orders of removal of the petitioners were issued there was neither any "hostile nation or government" of which they were natives or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won "from Germany a final and unconditional surrender." In other words, the President has made "public proclamation of the event," (see Section 21, Title 50, USCA), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is final. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German government, the political branch of the Government [fol. 8] has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of political action is emphasized because it has been the practice of the courts in cases dealing with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question.

For example, in *United States ex rel. Hack* vs. *Clark* (C. C. A. 7th 1947), 159 F. (2d) 552, it is stated:

> "Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a political question to be answered only by those branches of our Government charged with the responsibility of political decisions, namely, the executive and legislative branches. Jones vs. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Citizens Protective League vs. Clark."

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the final defeat, the complete demise and the substitution of its own power in the place of the hostile nation or govern-

ment, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

We say in view of this that there is no lawful authority to remove these persons to Germany inasmuch as there is no existing government of Germany.

Habeas corpus is a proper remedy for raising the question whether these petitioners were alien enemies when the orders of removal were issued. This we believe is settled beyond question in *United States* vs. *Uhl*, 137 F. (2d) 898, and *United States ex rel. Hack* vs. *Clark*, 159 F. (2d) 552.

Wherefore, petitioners pray:

1. That rule to show cause issue from this Court directed to the respondent requiring him to show cause why the writ of habeas corpus should not issue.

[fol. 9] 2. And for such other and further relief as the circumstances of the case may require and to this Court may seem just and proper.

James J. Laughlin, National Press Building, Counsel for Petitioners.

Let this amendment be filed.

Bolitha J. Laws, Chief Justice.

[fol. 10] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

RESPONDENT'S MOTION TO DISMISS PETITION—Filed July 21, 1947

Comes now the Respondent, Tom C. Clark, Attorney General of the United States, by his undersigned attorneys, and moves the Court as follows:

1. To issue its order dismissing the petition herein as to all Petitioners.

2. To rule, as to the petitioners listed in "Exhibit A" appended to this motion, all of whom were parties to the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, Habeas Corpus No. 3132 in this Court, (a) that the present petition is merely a renewal of the application for a writ of habeas corpus which was refused by this Court

and the United States Court of Appeals for the District of Columbia in that case, (b) that no sufficient ground for reconsideration of such application appears and (c) that, therefore, the dismissal of the petition as to such petitioners is not a decision refusing a writ of habeas corpus within the meaning of Par. 1 of Rule 45 of the Rules of the Supreme Court of the United States, and Rule 29(a) of the Rules of the United States Court of Appeals for the District of Columbia so as to prevent execution of the removal orders complained of by such petitioners herein.

The grounds for this motion are:

[fol. 11] (1) This Court does not have jurisdiction to issue a writ of habeas corpus with respect to any of the petitioners, all of whom are and, by the petition, are alleged to be, without the territorial confines of the District of Columbia.

(2) That all matters sought to be raised by the petitioners have been decided adversely to them in earlier actions and proceedings in this Court and in the United States Court of Appeals for the District of Columbia.

(3) That all allegations of the petition herein were in fact and in substance made in the petition in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General, supra,* which proceedings were dismissed by this Court and by the United States Court of Appeals for the District of Columbia.

Respectfully submitted, Peyton Ford, Assistant Attorney General; George Morris Fay, United States Attorney; Herbert A. Bergson, Special Assistant to the Attorney General; Enoch E. Ellison, Special Assistant to the Attorney General, Attorneys for Respondent.

[fol. 12] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING STAY—July 23, 1947

This cause comes on to be heard on the Amended Petition and Petition for Writ of Habeas Corpus, herein, on Respondent's Motion to Dismiss the Petition and to rule as to

certain Petitioners that the dismissal of the petition is not a decision refusing a writ of habeas corpus within the meaning of Par. 1 of Rule 45 of the Rules of the Supreme Court of the United States and Rule 29(a) of the Rules of the United States Court of Appeals for the District of Columbia, and on Petitioners' application for a stay based upon said rules and, after oral argument, the Court being fully advised in the matter, and it not appearing that there has been any material change in the pertinent facts or circumstances relating to the petitioners since the petition for a writ of habeas corpus was filed in this Court in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General,* Habeas Corpus No. 3132, and it appearing that, on December 10, 1946, this Court entered its order dismissing the petition in that case, that the petitioners in that case promptly noted an appeal from such order to the United States Court of Appeals for the District of Columbia, that on February 24, 1947, that Court entered its order dismissing the appeal and that certain of the petitioners herein were also petitioners in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General,* Habeas Corpus No. 3132, as follows:

> Paul Ahrens, George Willi Backofen, Paul Bante, Max Blank, Karl J. Boehm, Otto Braunger, Else Brinck, Walter Brinck, Albert Brueckner, Ernst E. Christoph, Hans Diebel, Hans Doelle, Johann R. Enders, Walter Engelbert, Wilhelm Engelbert, Anna Faller, Xavier Faller, John C. Fitting, Kurt Fries, Luise Fritsch, Anna Fuhr, Karl Fuhr, Rudolph Funk, Adolf Goelzer, Georg Grytzyk, Helene Hackenberg, Robert Hartmann, [fol. 13] Albert Haug, Erna Haupt, Hermann Hoehn, Hedwig Hohmann, Martin Hohmann, Paul Hohmann, Kurt Holz, Emma Weik Jans, Johannes L. Jung, Konrad Jungklaus, Joseph Kaiser, Maria Kerling, Hans Kippenberg, August Klapprott, Joseph Klein, Wilhelm Knaup, Fritz Koehler, Hermann Koetter, Maria Th. Kohler, Mathias Kohler, Bruno Koop, Jr., Bruno Koop, Sr., Arthur Kuehn, Wilhelm Lachnicht, Gotthilf Ludwig, Wilhelm Mank, Gertrude Neubacher, Otto Neubacher, George Neupert, Karl Nurnberger, John Olden, Willie Orths, Martin Ortner, Adolf Pasquay, Hans Poehner, Max Rapp, Hartwig Reese, Henry Reese, Kasper Rehle, Maximilian Reichel, Georg Riem-

schneider, Hermann Roehm, Anna Rubischon, Edwin Rubischon, Anton Ruebie, Gerhard Schacht, Wilhelm Schaumann, Karl Schelkshorn, Martin Schluckwerder, Hans Schmidt, Kurt Schmidt, Bernard Schmolke, Franz Schrader, Albert Schroeder, Siegfried Schulte, Karl Schweitzer, Kurt Schweitzer, Ernst Schwenk, Herman Schwinn, Herbert C. Seyfferth, Gerhard Sprenger, Meta Stoehr, Johann Stoll, Walter Sykora, Karl Uberschaer, Antonie Uhlig, Gregor Volkheimer, Otto Wagner, Hans Wichers, Johann Wiechers, Selma Wiechers, Paul Zitzmann,

and it being considered that, as to the above-named petitioners, the petition herein, in substance and in fact, constitutes an application for reconsideration of the decision refusing them a writ of habeas corpus in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, Habeas Corpus No. 3132, from which they have unsuccessfully appealed and have elected not to apply to the Supreme Court of the United States for a writ of certiorari, it is by the Court this 23d day of July, 1947,

Adjudged, Ordered and Decreed as follows:

That the Petitioners' application for a stay be, and the same hereby is, denied; the Respondent's motion be, and the same hereby is, in all respects, granted; and the amended petition and petition for writ of habeas corpus is hereby dismissed.

Bolitha J. Laws, Chief Justice.

Presented by Enoch E. Ellison, Special Assistant to the Attorney General.

It is hereby certified that a copy of the foregoing Order was this 23rd day of July, 1947, handed to James J. Laughlin, Esq., attorney for petitioners.

Enoch E. Ellison, Special Assistant to the Attorney General.

[fol. 14] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed July 24, 1947

Notice is hereby given this 24th day of July, 1947, that petitioners hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of July, 1947, in favor of respondent against said petitioners.

James J. Laughlin, Attorney for Petitioners.

Mail notice to: E. E. Ellison, Attorney, Dept. of Justice, Washington, D. C.

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed August 1, 1947

The Clerk will please prepare the record in the above entitled cause and include therein the following:

1. Petition for writ of habeas corpus.
2. Amendment to petition.
3. Motion to dismiss.
4. Notice of appeal.
5. This designation.
6. Clerk's certificate.

James J. Laughlin, National Press Building, Counsel for Petitioners.

I certify that I have this day mailed copy of this designation of record to Enoch E. Ellison, Esq., Department of Justice, Washington, D. C.

James J. Laughlin.

This the 1st day of August, 1947.

[fol. 16] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 17] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 3243

PAUL AHRENS, ET AL., Appellants,

v.

TOM C. CLARK, Attorney General of the United States, Appellee

MOTION TO DISMISS—Filed August 15, 1947

Now comes the appellee, Tom C. Clark, Attorney General of the United States, and moves pursuant to Rule 75(j) of the Rules of Civil Procedure that the appeal herein be dismissed on the grounds:

1. That all of the appellants, who complain of the order of the Court below dismissing their petition for a writ of habeas corpus, as amended, were and are, and, by the petition, are alleged to be, without the territorial confines of the District of Columbia.

2. That all matters sought to be raised by the petition herein, as amended, which was dismissed by the Court below have been decided adversely to the appellants by this Court in earlier cases and proceedings.

3. That as to the appellants named in the order of the Court below entered herein on July 23, 1947, as having been petitioners also in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, No. 3132 (No. 9449 of this Court), the petition herein, in substance and in fact, constituted an application to the Court below for reconsideration of its decision refusing them a writ of habeas corpus in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, from which they unsuccessfully appealed to this Court and, upon dismissal of such appeal, elected not to apply to [fol. 18] the Supreme Court of the United States for a writ of certiorari.

Respectfully submitted, Herbert A. Bergson, Acting Assistant Attorney General; George Morris Fay, United States Attorney; Enoch E. Ellison, Special Assistant to the Attorney General, Attorneys for Appellee.

Of Counsel: Clement L. McEachern, Attorney, Department of Justice.

[fol. 19] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS

1. Appellants are all alien enemies. All of them are, and by the petition are alleged to be, held in the custody of the Immigration and Naturalization Service at Ellis Island, New York Harbor. None is now or has been since the petition was filed within the territorial confines of the District of Columbia.

A writ of habeas corpus will not lie to test the custody of persons outside the territorial jurisdiction of the Court where the writ is sought.

Herman Agne et al. v. *Tom C. Clark, Attorney General,* No. 9449 in this Court, decided February 24, 1947 (granting motion to dismiss based both on this ground and on the ground of *res judicata);*

United States ex rel. Lynn v. *Downer,* 323 U. S. 817 (denying rehearing of previous denial of certiorari because moot, 322 U. S. 756);

Ex Parte Gouyet, 175 Fed. 230 (D. Mont.);

United States ex rel. Belardi v. *Day,* 50 F. 2d, 816 (C. C. A. 3);

United States ex rel. Harrington v. *Schletfeldt,* 136 F. 2d, 935, 940 (C. C. A. 7);

Jones v. *Biddle,* 131 F. 2d, 853 (C. C. A. 8; cert. den. 318 U. S. 784);

In Re Bickley, 3 Fed. Cas. Co. No. 1387 (D. C. N. Y. 1865).

[fol. 20] 2. All issues sought to be raised in the petition herein have been decided adversely to the petitioners in cases to which they were parties.

Herman Agne et al. v. *Tom C. Clark, Attorney General, supra;*

Citizens Protective League et al. v. *Tom C. Clark, Attorney General,* 155 F. 2d, 290, cert. den. 329 U. S. 787;

Maria Bertelmann et al. v. *Tom C. Clark, Attorney General,* D. C. D. C., Civil Action No. 1435-47, petition dismissed July 21, 1947.

3. As more fully stated in appellee's opposition to appellants' petition for stay filed herein on July 30, 1947, to which reference is respectfully made, this is the sixth suit which has been brought by this group of alien enemies, and their fifth appeal to this Court, to prevent their removal from the United States pursuant to removal orders issued by the Attorney General under Presidential Proclamation No. 2655 promulgated July 15, 1945 and the Alien Enemy Act of 1798, 1 Stat. 577 (8 U. S. C. § 21). The Court below has found as to those appellants who were parties to the habeas corpus proceeding of *Herman Agne et al.* v. *Tom C. Clark, Attorney General, supra,* whose names appear in the District Court's order of July 23, 1947, that the petition in substance and in fact amounts to a request for reconsideration of the Court's dismissal of the petition in the *Agne* case. No change in the material facts relating to the appellants, since the filing of the petition in that case, is alleged. Every allegation of fact appearing in the present petition has been made in earlier cases of which this Court has judicial knowledge *(Booth* v. *Fletcher,* 69 App. D. C., 351, 101 F. 2d, 676, 679, and cases there cited).

In their petition for a stay, the appellants pointed to two allegations to the amendment to the petition as creating a material difference between the petition in this case and their earlier petition in the *Agne* case. These matters were [fol. 21] fully dealt with in the appellee's opposition to the petition for stay and the contentions apparently were abandoned at the time of the conference on the petition for a stay. Accordingly, it will suffice to point out as to the first contention, i.e., that as to certain appellants, "their citizenship was taken from them without due process of law and as a result of war hysteria", was made in the *Citizens Protective League* cases and was disposed of by this Court's opinion in that case. (See Joint Appendix in Nos. 9193, 9194 and 9195, p. 2, pars. 7 & 8; p. 8, pars. 3 & 5, and p. 10, par. 12. See, also, 155 F. 2d at 292). Since the allegation must have been omitted deliberately from the petition in the subsequent *Agne* case, its inclusion in a very vague manner in the present petition adds nothing to the refusal of the Court below to reconsider its previous action in the *Agne* case. Cf. *Sunal* v. *Large,* S. Ct. U. S., Nos. 535 and 840, Oct. Term 1946, decided June 23, 1947.

As to the second alleged difference, as we have previously pointed out, the contention that the war ended with the ces-

sation of hostilities insofar as the Alien Enemy Act of 1798 is concerned, with the consequence that the Executive Power of removal under that Act has come to an end, has been advanced in one form or another in each of the prior suits, including the *Agne* case. The contention was rejected by this Court in the *Citizens Protective League* cases (155 F. 2d at 295) and recently was rejected by the United States Circuit Court of Appeals for the Second Circuit. *United States ex rel. Kessler* v. *Watkins*, No. 279, Oct. Term 1946, filed June 24, 1947 (copies lodged with the Clerk).

At the conference on the appellants' petition for a stay, the contention was made, as we understand it, that the present case differed from the earlier cases in that when such earlier cases were instituted the removal orders had not yet been issued by the Attorney General as to most of the appellants. While this was true as to the majority of the appellants when the petition in the *Citizens Protective League* cases were filed, it is not understood that the decision [fol. 22] of this Court in any way turned upon that fact. In any event, the petition in the *Agne* case clearly alleges that at the time of its filing "the respondent is attempting to deport them [the petitioners] to Germany" and that the "respondent is seeking to deport by virtue of the Presidential Proclamation, dated July 14, 1945, which Presidential Proclamation was issued pursuant to the Alien Enemy Act of 1798" (Pars. 2-3).

Par. 1 of Rule 45 of the Rules of the Supreme Court and Rule 29(a) of the Rules of this Court are identical and are as follows:

> Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

The Court below has held that these rules are inapplicable to the appellants who were parties to the *Agne* suit. Obviously, it was not the intended purpose of the rules to permit private parties to tie the hands of Government officers by the mere filing of repeated suits and by notation of orders dismissing them. Plainly, this would be an interference with the purpose of the Congress in enacting the Alien Enemy Act of 1798 and with the powers delegated to the Chief Executive thereunder. It is respectfully submitted that the placing of such power in the hands of a private individual is not a proper exercise of judicial power and the

rule should not be construed so as to require that result. This would be true also if the rules should be construed to place a ministerial duty upon courts inferior to the Supreme Court to issue stays in such circumstances, because, in that event, the power of interference would in fact be placed in the hands of private parties. It is not questioned that both the courts and the executive officers of the Government should so act as to safeguard the remedy of habeas corpus to every reasonable degree. Heretofore in these cases it has not been necessary for the appellants to ask the Court for stays or injunctions *pendente lite*. However, it is submitted that the time has now come when the appellants have had every reasonable opportunity to present their cases to the courts and that, at least as to those appellants named in [fol. 23] the order of the court below, who have previously applied for habeas corpus relief, the District Court was plainly correct in deciding that the rules in question were inapplicable. While the rules literally cover "a decision refusing a writ of habeas corpus", they do not expressly cover a decision dismissing a petition which in substance and in fact is a request for reconsideration of an earlier decision refusing such a writ. They should not be so construed.

Conclusion

For the foregoing reasons the appeal, in all respects, should be dismissed.

Respectfully submitted, Herbert A. Bergson, Acting Assistant Attorney General; George Morris Fay, United States Attorney; Enoch E. Ellison, Special Assistant to the Attorney General.

Of Counsel: Clement L. McEachern, Attorney, Department of Justice.

[fol. 24] Service acknowledged of a copy of the foregoing Motion to Dismiss and of the memorandum of Points and Authorities in support thereof, this 15 day of August, 1947.

(S.) James J. Laughlin, Attorney for Appellants.

Notice

James J. Laughlin, National Press Building, Washington, D. C., Attorney for Appellants.

Please be advised that memorandum of points and authorities in support of the foregoing motion is attached

hereto. The rules of the above entitled Court require that if you oppose the granting of this motion, you shall, within five days or such further time as the Court may allow or the parties may agree upon, file in reply a memorandum of points and authorities in opposition thereto.

Clement L. McEachern, Attorney, Department of Justice.

[fol. 25] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION TO DISMISS—Filed August 22, 1947

At the outset we raise the point that the case is not properly here for disposition inasmuch as the record has not been prepared by the District Court in due course for filing in this Court. We expect the record to be ready within the next few days. We also desire to call attention to the fact that there has been filed in District Court notice of appeal in the case of Bertelmann et al. vs. Clark. Designation of record has been prepared and record is now being assembled for filing in this Court. This Court theretofore could not properly pass upon the motion to dismiss until it had before it all points raised in the Bertelmann case to enable this Court to determine whether or not the points raised in the present habeas corpus case and the Bertelmann case are different from the points previously raised and passed upon by this Court.

We also desire to call attention to the fact that this case should be considered in the light of the decision of the Second Circuit in the case of *Von Heymann vs. Watkins*, 159 F. (2d) 650. The Second Circuit Court determined in that case that enemy aliens should have a reasonable opportunity to depart from the United States and there has as yet been no determination as to what the reasonable time [fol. 26] element contemplates. We also desire to call attention to the fact that Section 24, Title 50, U. S. Code, provides as follows:

> "When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal

of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be."

We also desire to call attention to the fact that an attempt to remove these persons is in violation of the Constitutional provisions against:

a. Unlawful delegation by the President of a judicial function which it is his duty to exercise and which he cannot delegate (Const. Art. 1, Sec. 1; Art. VI, Sec. II);

b. The passage of bills of attainder or ex poste facto laws (Const. Art. 1, Sec. IX);

c. Conviction of any person of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court, appellants having been accused in said removal order of adhering to an enemy of the United States, which is defined as treason (Const. Art. III, Sec. III);

d. Violation of the laws of the United States and of all treaties made under their authority (Const. Art. VI, Sec. II);

e. Abridging the freedom of speech or of the press (1st Amdt.);

f. Invasion of appellants' personal rights to be secure in his person, house, papers and effects (4th Amdt.);

g. Against holding appellants to answer for an infamous crime without a presentment or indictment of a grand jury and depriving appellants of their life, liberty and property without due process of law (5th Amdt.);

h. Depriving appellants of a speedy and public trial, re- [fol. 27] fusing to inform them of the nature and cause of the accusations against them, denying them the right to be confronted with witnesses against them and denying them the right to have the assistance of counsel (6th Amdt.);

i. Imposing excessive fines and inflicting cruel and inhuman punishment on appellants (8th Amdt.);

j. Subjecting appellants to slavery and involuntary servitude in a place subject to the jurisdiction of the United

States, despite the fact that they have not been accused of, nor tried for, nor convicted of any crime (13th Amdt.).

A question has been raised that the allegations in the case here for review and the Bertelmann case now on the way to this Court present no new questions. We desire to call attention to the fact that in the present case the following is found in the amendment to the writ of habeas corpus:

> "A considerable number of the petitioners herein are not in fact alien enemies, as defined in the Act of July 6, 1798, Title 50, Section 21, United States Code, in that their citizenship was taken from them without due process of law and as a result of war hysteria. Petitioners ask the Court for an opportunity to present evidence on this aspect of the case."

With respect to this we will be able to show that a considerable number of the appellants had their citizenship wrongfully taken from them and if the action was wrongful and without regard to due process of law they would not in fact be alien enemies and could not be removed by virtue of the Presidential proclamation.

In the amendment filed in the present petition for habeas corpus, there appears this:

> "When the orders of removal were issued there was no longer a war and the petitioners were no longer alien enemies, as defined in the Act of July 6, 1798. A study of the Congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words 'declared war' and 'hostile nation or government', the legislators had in mind 'war in fact' or 'actual hostilities' and not a technical 'state of war'."

[fol. 28] We contend that this raises a very serious question and one that definitely distinguishes the writ of habeas corpus in the present case as compared with the prior writ.

The amendment to the present writ reads further as follows:

> "When this Act was written in the spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to

spread across the Atlantic and engulf the United States (see Bas vs. Tingy, 1800, 4 Dallas 37, at 40). The other was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

> '* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons (aliens) as any of the States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808.'

In view of the proclamation issued to the people of Germany and in view of the official declaration of the Department of State declaring the complete demise of the German government, the cessation of actual hostilities and the assumption of supreme authority by the Allied Powers as to every function of the former German government, it is respectfully submitted that not later than October 29, 1945 the political branch of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

When the orders of removal of the petitioners were issued there was neither any 'hostile nation or government' of which they were natives or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won 'from Germany a final and unconditional surrender.' In other words, the President has made 'public proclamation of the event,' (see Section 21, Title 50, U. S. C. A.), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is final. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German government, the political branch of the Government has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of political action is emphasized because it has been the practice of the courts in cases dealing

with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question. [fol. 29] For example, in *United States ex rel. Hack vs. Clark* (C. C. A. 7th 1947), 159 F. (2d) 552, it is stated:

> 'Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a political question to be answered only by those branches of our Government charged with the responsibility of political decisions, namely, the executive and legislative branches. Jones vs. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Citizens Protective League vs. Clark.'

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the final defeat, the complete demise and the substitution of its own power in the place of the hostile nation or government, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

We say in view of this that there is no lawful authority to remove these persons to Germany inasmuch as there is no existing government of Germany."

The view taken by the appellee practically amounts to a denial of the Constitutional guarantees to these appellants. It cannot be contended that the hearing accorded them was consistent with due process of law. A hearing, to conform to due process of law, permits the accused to confront his accusers, to cross-examine the witnesses appearing against him, to offer testimony in his own behalf and to have the assistance of counsel. We have never understood that the mere fact that persons are enemy aliens should be reason for depriving them of these Constitutional safeguards. In the case of *Application of Yamashita*, 68 Sup. Ct. 340, 327 U. S. 1, we find this in the dissenting opinion of Justice Murphy:

> "The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war

crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to [fol. 30] every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States."

In the dissenting opinion of Justice Rutledge, in the same case, we find this:

"Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could undertsand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause."

And in conclusion Justice Rutledge said:

> "I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.
>
> It was a great patriot who said:
>
> 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.' (From the writings of Thomas Paine)."

It is our view, therefore, that substantial questions are involved in this appeal and that it should be heard on the merits in the regular course and the motion to dismiss should be denied.

[fol. 31] James J. Laughlin, National Press Building, Counsel for Appellants.

I certify that I have this day mailed copy of this opposition to Enoch E. Ellison, Esq., Department of Justice, Washington, D. C.

James J. Laughlin.

This the 22nd day of August, 1947.

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1947

No. 9613

PAUL AHRENS, et al., Appellants,

v.

TOM C. CLARK, Attorney General of the United States,

Appellee

Before Stephens, Clark and Prettyman, JJ.

ORDER DISMISSING APPEAL—October 30, 1947

On consideration of appellee's motion to dismiss the appeal herein, and of appellants' opposition thereto, it is

Ordered by the Court that this appeal be, and it is hereby, dismissed. *Sanders* v. *Bennett*, 80 U. S. App. D. C. 32, 148 F. (2d) 19 (1945); *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7, 1943); *Jones v. Biddle*, 131 F. (2d) 853 (C. C. A. 8, 1942); *U. S. ex rel. Belardi* v. *Day*, 50 F. (2d) 816 (C. C. A. 3, 1931).

Per Curiam.

Dated October 30, 1947.

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed November 13, 1947

The Clerk will please prepare the record for the Supreme Court of the United States in the above entitled cause and include therein the following:

1. Transcript of record.
2. Motion to dismiss.
3. Opposition to motion to dismiss.
4. Order dismissing cause.

5. This designation of record.
6. Clerk's certificate.

James J. Laughlin, National Press Building, Counsel for Appellants.

I certify that I have this day mailed copy of this designation of record to Enoch E. Ellison, Esq., Special Assistant to the Attorney Geenral, Department of Justice, Washington, D. C.

James J. Laughlin.

This the 12th day of November, 1947.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER RE ORIGINAL RECORD—November 18, 1947

On consideration of appellants' motion to authorize the Clerk to transmit the original transcript of record in the above entitled cause to the Supreme Court for use in connection with petition for review on writ of certiorari, It is

Ordered by the Court that the motion be, and it is hereby, granted.

Per Curiam.

Dated November 18, 1947.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.